Supreme Court, U.S.
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NO. 99-1132

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ILLINOIS,
Petitioner,

v.

CHARLES MCARTHUR,
Respondent.

On Writ of Certiorari to the
Appellate Court of Illinois, Fourth District

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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August 14, 2000

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QUESTION PRESENTED FOR REVIEW

Is it reasonable under the Fourth Amendment for police officers who have probable cause to believe that a residence contains evidence that could readily be destroyed to secure the residence by preventing its occupant and others from entering unaccompanied while the officers seek a search warrant?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of certiorari in the United States Supreme Court in more than two dozen cases, and certiorari has been accepted in two important First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed amicus curiae briefs in many significant Supreme Court cases, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 120 S.Ct. 1595 (2000), *Illinois v. Wardlow*, 120 S.Ct. 673 (2000), *Florida v. J.L.*, 120 S.Ct. 1375 (2000), *Indianapolis v. Edmond*, 99-1030 (oral argument October 3, 2000) and *Ferguson v. City of Charleston*, S.Ct. No. 99-0936 (oral argument October 4, 2000), and have also filed a multitude of amicus curiae briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including

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1 *Amicus curiae* The Rutherford Institute files this brief with consent from both parties. Counsel for The Rutherford Institute authored this brief in its entirety, with able assistance from law clerk Margaret W. Ng'ang'a (*J.D.* 2000, Louisiana State Univ. School of Law). No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

numerous Fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

The Rutherford Institute is participating in *State of Illinois v. McArthur* as an *amicus* of the Court because it believes the Petitioner is seeking an unreasonable expansion of police authority that is diametrically opposed to historic protections afforded the homes of citizens by the Fourth Amendment. While certainly government at all levels, as well as the public as a whole, has a vested interest in the eradication of illegal drugs, it is the judiciary's province and duty to ensure that the constitutionally guaranteed rights of private citizens are not run roughshod in the rush to win the "war on drugs." In the words of Justice Stewart in *Coolidge v. New Hampshire*:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won -- by legal and constitutional means in England, and by revolution on this continent -- a right of personal security against arbitrary intrusions by official power.

403 U.S. 443, at 455 (1971) (plurality opinion).

The issue squarely before the Court in this case is whether, in view of the time-honored protections afforded citizens' private residences by the Fourth Amendment, the

Court will now countenance the securing by police of a home against its residents for an indefinite period of time, on the mere presumption that they will be able to obtain a warrant on probable cause to search the interior. The Court's amicus submits that such a practice is virtually indistinguishable from an occupation of the home itself by police authorities, since in either event the resident is deprived of the dominion and enjoyment of his home. Like warrantless searches for persons or things within a residence absent exigent circumstances, which have repeatedly been condemned by the Court whether or not probable cause was shown to have existed, the practice of securing a home against its residents should also be condemned as fundamentally incompatible with the Fourth Amendment.

SUMMARY OF ARGUMENT

By securing Respondent's home and prohibiting him entry unaccompanied by police officers, the police effectively "seized" the home within the meaning of the Fourth Amendment. The seizure in question was per se unreasonable under the Fourth Amendment, since no exigency existed that necessitated securing the home pending the issuance of the warrant.

This case is clearly distinguishable from *Segura v. United States*, 486 U.S. 796 (1984), in which the Court upheld against a Fourth Amendment challenge the securing of premises from the outside pending the issuance of a search warrant. Where, as here, the homeowner's possessory interest in his home was denied for a substantial period of time absent a warrant or exigent circumstances, *Segura* actually counsels against the admissibility of evidence seized as a result of the seizure.

ARGUMENT

I. The State of Illinois Seeks an Unwarranted and Dangerous Exception to the Warrant and Probable Cause Requirement to Permit Police to Subject Personal Residences to Investigative Detainment Pending the Issuance of a Warrant.

The Fourth Amendment to the United States Constitution affirms and safeguards, inter alia, "[t]he right of the people to be secure in their persons [and] houses ... against unreasonable searches and seizures." As the Court has observed on numerous occasions, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 586 (1980); *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

The homes of citizens enjoy a virtually sacrosanct position in English and American law. The Supreme Court recently harkened back to this principle in *Wilson v. Layne*, 526 U.S. 603, 610 (1999), in which it unanimously held the practice of media "ride-alongs" to film the execution of warrants in residences as violative of the Fourth Amendment. The Court quoted *Semayne's Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195, an English case dating back to 1604 which made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." In fact, "[t]he zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." *Payton*, 445 U.S. at 596-97.

The crux of this ancient principle lies in the consistent application of the often-stated rule that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton*, 445 U.S. at 586 (citations omitted). While the Amendment does not establish a warrant requirement for all seizures,

> [I]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Steagald v. United States, 451 U.S. 204, 211 (1981), quoting *Payton v. New York*, 445 U.S. at 590. See also *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475, 477-478 (1971); *Jones* v. *United States*, 357 U.S. 493, 497-498 (1958); *Agnello* v. *United States*, 269 U.S. 20, 32-33 (1925); *Johnson* v. United States, 333 U.S. 10, 13-15 (1948). The Court's most familiar articulation of this rule is found in *Coolidge v. New Hampshire*:

> It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances."

403 U.S. at 474-75.

In view of this principle, the Court in *Payton* declared unconstitutional a New York statute that permitted police to search for and arrest a suspect in his own residence without a search warrant, where they possessed probable cause to arrest:

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well defined "exigent circumstances."

403 U.S. at 474-475, 477-478.

Significantly for the present case, this presumption against the constitutionality of warrantless searches within a residence applies to searches for things as well as persons, and regardless of whether probable cause exists to search for the items. The Court has characterized it as a "long-settled premise" that "absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Payton*, at 587-88; see also id. at 588, n. 27 (approving lower court's reasoning that "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.")

The rule against warrantless seizures of personal

property is informed by very similar principles. The Supreme Court in *United States v. Place*, 462 U.S. 696 (1983), held that a police detention of a passenger's luggage for ninety minutes in order to procure a canine sniff of the contents for drugs was an unreasonable deprivation of the individual's "liberty interest in proceeding with his itinerary," which also is protected by the Fourth Amendment. 462 U.S. at 708-710. Place affirmed the constitutional importance of ensuring the integrity of possessions against unreasonably lengthy seizures. In Respondent's case, the "possessions" in question -- a suspect's own home and all of his personal belongings -- carry a much more compelling expectation of privacy than the luggage in *Place*. If in *Place*, a ninety-minute detention of luggage was held unreasonable, then surely a seizure of a person's home for the same or longer period of time must also be deemed unreasonable. The Fourth Amendment standard for protection for movable personal property should not be read to afford greater protection than that given real property.

The rule for vehicle seizures, though somewhat more flexible, is animated by the same rationale as that for baggage seizures. The Court's decision in *Coolidge v. New Hampshire*, supra, held that on the facts of that case, a warrantless search and seizure of the vehicle in question could not be justified under the any of the "few specifically established and well-defined exceptions" to the warrant requirement. 403 U.S. at 455. *Coolidge* established that even an automobile may not be subjected to a warrantless search and seizure based upon probable cause, if it is stationary and the exigency rationale underlying the so-called "car search exception" is therefore inapplicable. The "exigent circumstances" rationale of *Carroll v. United States*, 267 U.S. 132 (1925), that in the case of automobiles "it is not practicable to secure a warrant because

the vehicle can be moved quickly out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. at 153, survives the Court's holding in *California v. Acevedo*, 500 U.S. 565 (1991). *Acevedo* merely clarified *Carroll* "as providing one rule to govern all automobile searches," that is, that "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." 500 U.S. at 580. *Acevedo* did not undercut the rationale of *Carroll*; in fact, it paid due respect to it, stating that "[the Court] therefore held [in *Carroll*] that a warrantless search of an automobile, based upon probable cause ... in the light of an exigency arising out of the likely disappearance of the vehicle, did not contravene the Warrant Clause...." *Acevedo*, 500 U.S. at 569 (emphasis added). The exigent circumstances rationale of *Carroll* has been consistently stressed by the Court. See, e.g., *Chambers v. Maroney*, 399 U.S. 42 (1970) (existence of exigent circumstances to be determined at the time automobile is seized); *Coolidge v. New Hampshire*, 403 U.S. 443 (no exigent circumstances pertained where vehicle was parked on defendant's private driveway and police had known of its location there); *Cardwell v. Lewis*, 417 U.S. 583 (1974) (citing exigent circumstances justifying impoundment of suspect's vehicle and distinguishing *Coolidge*).

Likewise, although the Court has previously found the warrant requirement of the Fourth Amendment inapplicable in cases where the "'exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment," *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)), the facts in this case do not show the existence of exigent circumstances sufficient to

justify the deprivation of Respondent's right to dominion over his home. The Court in *Vale v. Louisiana*, 399 U.S. 30 (1970), indicated that a warrantless search of premises, even one not incident to an arrest, might be permitted where evidence was "in the process of destruction." The *Vale* Court did not allow the warrantless search where there was merely a possibility of the evidence being destroyed; it required the state to demonstrate, in essence, that destruction of the contraband was imminent and threatened. 399 U.S. at 34. See also *Chimel v. California*, 395 U.S. 752 (1969) (rejecting argument that suspect's wife, who was at home at time of his arrest and could have destroyed evidence of theft before warrant was obtained, justified "exigent circumstances" exception); *Johnson v. United States*, 333 U.S. 10 (1948) (rejecting state's contention that exigent circumstances existed on the basis of fumes emanating from hotel room). Further, the State of Illinois cannot demonstrate that procuring a warrant would be "impractical" under the circumstances, as the Court's decisions require. *Chimel*, 395 U.S. at 768; *Vale*, 399 U.S. at 35. To the contrary, their actions demonstrated the opposite, since they obtained a warrant as a matter of course within several hours.

Even if it can reasonably be contended that an exigency existed in the circumstances presented here, the "exigency" -- the presumption that Respondent would attempt to destroy the contraband before a warrant could be obtained -- was created by the officers themselves, and therefore cannot be relied upon as a justification for the warrantless seizure of Respondent's property. The officers created the exigency by calling the defendant out and informing him that they had information about the presence of drugs inside the house. The Respondent then exercised his constitutional right not to have his privacy violated by a warrantless search by refusing to give his consent.

Had the officers simply staked the residence out while obtaining a warrant, the deprivation of Respondent's dominion and enjoyment of his home engendered by the seizure would not have been necessary. In the event Respondent had left his residence, the officers could have simply subjected him to a *Terry*-style "pat-down" search to ensure that he had not removed the contraband from the home. See *Terry v. Ohio*, 392 U.S. 1 (1968); *Adams v. Williams*, 407 U.S. 143 (1972) (extending *Terry* stop to possessory offenses). Such an intrusion, though not insubstantial, would certainly have been less of a burden on Respondent's privacy and the sanctity of his home than the lengthy lockout they decided to impose.

II. Permitting Police to Seize a Personal Residence on the Basis of an Assumption that Probable Cause Exists and that a Warrant Will be Issued Invites an Unprecedented Expansion of Police Power that Will Inevitably be Abused.

The police should not be allowed to argue ex post facto that the Fourth Amendment violation was cured by securing a warrant. The constitutional violation should be assessed at the time of the seizure, for two reasons that are at the heart of Fourth Amendment jurisprudence. First, the "reasonableness" of the length of the detainment cannot be assessed ex ante, since the duration of the lockdown is indeterminate until the warrant is issued. The duration of such a lockdown is not in the hands of police officers, which would mitigate the burdensomeness somewhat; it is subject to the actions of third persons, such as magistrates, court personnel, and other third parties necessary to assist in the warrant process. This crucial distinction militates strongly against granting officers authority to seize a residence pending issuance of a warrant, since even if police do

not intend to abuse it, the use of such authority would invariably become unreasonable in many cases, and once the duration becomes unreasonable, the unconstitutional deprivation of the citizen's rights cannot be cured.

Second, and perhaps more importantly, such authority would almost certainly be abused. Officers would have virtually no incentive to gauge the existence of probable cause carefully before they secure a residence, since in many cases the mere act of doing so will force a naive householder to resign himself or herself to the search and give in with "consent." Further, the possession of the authority to "lock down" residences inevitably creates an adverse risk of its abuse in the very nature of the often heated and tense exercise of law enforcement. As Justice Jackson warned, writing for the Court in *Johnson v. United States*, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police

officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Similarly, the Court cautioned in *Steagald*, *supra*:

> The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this checkpoint between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home.

451 U.S. at 212-13 (citations omitted). "[E]xisting remedies" for such abuse, the Court warned, "such as motions to suppress illegally procured evidence and damages actions for Fourth Amendment violations," do not provide adequate means of redress. 451 U.S. at 21.

> Indeed, if suppression motions and damages actions were sufficient to implement the Fourth Amendment's prohibition against unreasonable searches and seizures, there would be no need for the constitutional requirement that in the absence of exigent

> circumstances a warrant must be obtained for a home arrest or a search of a home for objects. We have instead concluded that in such cases the participation of a detached magistrate in the probable-cause determination is an essential element of a reasonable search or seizure ....

Id. at 215-16.

CONCLUSION

The Court's *amicus* respectfully submits that the Illinois appellate court was correct in finding that there was a "constructive eviction" of Respondent by the police in the two hours pending the issuance of a search warrant. *People v. McArthur*, 304 Ill.App.3d 395, 402, 713 N.E.2d 93, 98 (4th Dist. 1999). The court consequently held correctly that the police conduct in securing Respondent's residence while awaiting a search warrant was an unreasonable seizure under the Fourth Amendment, and that the evidence obtained thereby was properly suppressed.

The Court has never sanctioned and should not sanction now police lockdowns of citizens' residences without a warrant or exigent circumstances. The idea that the police possess the authority to lock down homes on the mere assumption that they will be able to obtain a warrant on probable cause rewards poor police work. More than that, it strikes at the heart of the Fourth Amendment, which has from time immemorial been interpreted to intend that the threshold of a citizen's home is one of the most important barriers against tyranny. The Court's *amicus* urges the Court to bear in mind the words of Pitt's address in

the House of Commons in March 1763, which, as the Court has noted, "echoed and re-echoed throughout the Colonies" at the time of the framing of the Fourth Amendment:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter -- all his force dares not cross the threshold of the ruined tenement![2]

For the compelling reasons set forth herein, The Rutherford Institute respectfully contends that the judgment of the Court of Appeals, upholding the trial court's suppression of the evidence seized from Respondent's home, should be affirmed.

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2 *Payton*, 445 U.S. at 601, n. 54, quoting *Miller v. United States*, 357 U.S. 301, 307 (1958).